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In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W.T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the State of Nebraska ("Nebraska") submits its brief in opposition to the Petition for Writ of Certiorari (the "Petition") filed by the State of North Dakota ("North Dakota") and the State of South Dakota ("South Dakota"), collectively referred to herein as "the Dakotas."

In sum, the Dakotas dramatically misstate the issue presented and ruled on below. The Eighth Circuit Court of Appeals, in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (2003), did not decide the Question Presented as articulated by the Dakotas. The Eighth Circuit ruled on discrete issues arising under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* The issues the Court of Appeals addressed were correctly decided. By their Petition, the Dakotas improperly seek judicial review of the wisdom of Congressional choice and a reallocation of the waters of the Missouri River. The Petition should be denied.

OBJECTION TO CONSIDERATION OF THE QUESTION PRESENTED

Supreme Court Rule 15.2 admonishes counsel "that they have an obligation to the Court to point out . . . any perceived misstatement made in the Petition." The rule cautions, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the

Court's attention on the brief in opposition." In furtherance of this obligation, Nebraska objects to the Question Presented. Nebraska further objects to the Dakotas' distorted portrayal of the interests of the downstream states. The bases of Nebraska's objections are set forth herein.

STATEMENT OF THE CASE

I. MISSOURI RIVER MAIN STEM DAM AND RESERVOIR MANAGEMENT

The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 ("FCA"), authorized the construction and operation of dams and reservoirs by the United States Army Corps of Engineers ("Corps") on the main stem of the Missouri River.[1] Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage the system. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 815 (1988). In addition, the main stem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Authorized project purposes (other than the primary purposes of navigation and flood control) include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247, 78th Cong., 2nd Sess. (Nov. 21, 1944) at 3. In adopting the FCA, Congress recognized that the amount of water in storage

[1] The Dakotas claim all five reservoirs are located within their borders. Petition at 5. One of the dams, Gavins Point, is located in both South Dakota and Nebraska.

behind the dams would fluctuate from year-to-year based on available precipitation and the need to meet authorized downstream uses, for which water from the reservoirs was to be released. *Id.* at 3-4. As a result, the dams are not operated in isolation, but rather as an integrated system functioning in concert.

To implement the provisions of the FCA, the Corps adopted regulations in accordance with Section 7 of that Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Main Stem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960 and made revisions to it in 1975 and 1979. The Master Manual presents the regulatory framework by which the Corps attempts to achieve the multiple purposes for which the dam and reservoir system was created. *E.g.*, Master Manual, § IX, ¶ 9-1 ("Presented in this section of the manual are the operational objectives and requirements, together with descriptions of multi-purpose operation plans for functions other than flood control. These functions include irrigation, navigation, water supply, power, fish and wildlife, water quality, and recreation."). The Dakotas never challenged the validity of the Master Manual or its revisions until now.

In addition to its primary navigation and flood control mandates, the FCA also required the Corps to produce hydropower from the main stem dams to provide affordable electric power over a multi-state region and to offset the enormous cost of dam construction. Section 5 of the FCA states: "Electric power and energy generated at

reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles. . . . " *See also* S. DOC. 247 at 1, 3-4. In view of this obligation, the Corps has placed a high priority on the production of hydropower, which is marketed throughout the Missouri River basin by a separate federal agency, the Western Area Power Administration ("WAPA"). The Master Manual reflects this priority and allows the Corps to release water stored in the main stem reservoirs to achieve "the efficient generation of power to meet the area's needs consistent with other uses and power market conditions." Master Manual, § IX, ¶ 9-3.

Since 1960, significant economic development has occurred along the Missouri River that is dependant upon the water management regime established by the Master Manual and the River flows maintained thereunder. From 1960 to the present, the Corps has operated the main stem dams and reservoirs in accordance with the Master Manual. The existing flow regime supports a wide range of economic activities along the River. Municipalities, private industry and power producers have constructed extensive infrastructure designed to utilize the Missouri River for its authorized purposes in direct reliance on the flow regime created by such operations. Thus, this case does not simply pit the downstream navigation industry against upstream recreation interests as the Dakotas incorrectly assert. *E.g.*, Petition at (i).

The National Academy of Sciences ("NAS") recently highlighted the importance of the Missouri River as a source of supply for municipal and industrial uses. NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002) ("NAS Report").[2] The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93. Nebraska has the largest share of water supply benefits derived from existing Corps operations. The NAS explains that in 1994, for instance, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id.* It noted that water supply benefits "are concentrated in the thermal generating activities in Nebraska and Iowa." *Id.* Of the total water supply benefits accruing to the Basin, Nebraska receives 44.8%, or approximately $256 million annually in 1994 dollars. *Id.* at 94. Hydropower benefits, measured by the costs of alternative supplies, have an annualized value of $615 million. *Id.* at 97. Of that benefit, Nebraska receives 27.3%, or approximately $168 million. *Id.*

These numbers are staggering, but perhaps most impressive is the $18 billion in total flood damage prevented as of 1998 as a result of the FCA. NAS Report at 99. The principal states benefiting from such flood control operations include Nebraska, which receives 18.7% – or over $77 million – of the annualized $414 million flood

[2] The NAS Report is available, in its entirety, from the National Academy Press at http://books.nap.edu/catalog/10277.html.

control benefits accruing to the Basin. *Id.* at 100. These figures only take into account property damage and cannot quantify the incalculable value of lives saved by the Corps' operations.

In Nebraska alone, four publicly owned thermal power plants have historically relied, and continue to rely, on the flow regime set forth in the Master Manual. The existing flow regime represents the plants' sole source of water for cooling purposes. These plants will be forced to curtail production or shut down entirely if the Corps fails to release water from upstream reservoirs as required under the Master Manual. Retention of water upstream in contravention of the Master Manual will also decrease the amount of hydropower generated at the main stem facilities and available for purchase from WAPA. Because Nebraska utilities purchase more hydropower than the utilities of any other state, Nebraska power consumers will be disproportionately adversely impacted by reduced hydropower supplies. Nevertheless, other Missouri River Basin states are similarly reliant on the River and WAPA hydropower. Thus, the entire region could be impacted adversely by departure from the Master Manual.

Finally, the FCA authorized fishing and other recreational pursuits at the main stem reservoirs on certain conditions. Section 4 of the FCA states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . when such use is determined by the Secretary of War not to be contrary to the public interest." *Id.* The Master Manual implements this provision by requiring the operation of the main stem dams to provide for recreation "insofar, as possible without

serious interference" with the other project purposes. Master Manual, § IX, ¶ 9-3.

Although not accorded the highest priority by Congress, recreation does have a role in the Missouri River system. In fact, the "national and world class sport fisheries" and related recreational interests discussed in the Petition were created in the first instance by construction of the main stem dams and reservoirs and the Corps' operations under the Master Manual. As the Dakotas explain, they benefit greatly from "thriving upstream recreation." Petition at (i), 8-9. They, nevertheless, claim that their interests in the Missouri River are somehow "compromised" by operations under the Master Manual and the Eighth Circuit's decision enforcing the same. Petition at 16. The Dakotas now seek to *maximize* their recreational revenues at the expense of the downstream states.

II. HISTORY OF THE PRESENT MISSOURI RIVER LITIGATION.

South Dakota v. Ubbelohde "arose out of the prolonged drought conditions that the Missouri River has been experiencing over the last several years." 330 F.3d at 1020. The Master Manual is designed to provide for the orderly operation of the main stem reservoirs under a range of climatic conditions, including drought. *E.g.*, 33 C.F.R. §§ 222.5(i)(1); 222.5(i)(5). The Master Manual requires the Corps to release water from upstream reservoirs to meet authorized project purposes downstream. In order to minimize any disruption to upstream interests resulting from those releases, the Master Manual employs a rotational scheme, allowing for releases from a different

reservoir each spring while maintaining levels in the other reservoirs.[3] In accordance with the Master Manual and the 2002-2003 Annual Operating Plan ("AOP") developed under the Manual, the Corps determined it necessary to release water in the spring of 2002 from Lake Oahe in South Dakota to maintain downstream uses, including navigation and power production. *See Id.* at 1021.

Oahe Dam and Lake Oahe, as managed by the Corps under the Master Manual, support a recreational fishery. Thus, while the Dakotas previously endorsed the Corps' plan of "unbalanced" regulation, South Dakota changed course when it became apparent that such releases would prevent a successful smelt spawn in the Lake. Because smelt are a preferred prey fish of the sport fish, walleye, South Dakota feared a reduced smelt spawn would harm its walleye fishery and decrease recreational revenues at the Lake. Accordingly, South Dakota filed an action on April 25, 2002 seeking a temporary restraining order and preliminary injunction to prevent releases required under the Master Manual. After a hearing, the South Dakota District Court entered a temporary restraining order requiring the Corps to maintain lake levels until a preliminary injunction hearing could be held.

Before the next hearing, South Dakota amended its complaint to expand its request for injunctive relief to include Lake Francis Case. Nebraska and others moved to intervene, explaining that, in light of the main stem system's integrated operations, an injunction limiting

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[3] The Corps refers to this method of reservoir management as "unbalanced" reservoir regulation.

releases from additional reservoirs would ultimately paralyze the Corps' operation of the system. Nebraska warned of flow reductions that would prevent Nebraska's power plants from operating, reduce hydropower benefits during key summer months, harm Nebraska's recreation industry, create the threat of stranded barges, and harm Nebraska's municipal drinking water supplies. Nevertheless, the South Dakota Court granted the expanded injunction as to both South Dakota reservoirs and denied Nebraska's motion to intervene on May 10, 2002.

As explained by the Eighth Circuit Court of Appeals: "The South Dakota Court's injunction had a cascading effect. To cope with the injunction, the Corps planned to lower Lake Sakakawea, which is located in North Dakota. The State of North Dakota brought suit in the federal District Court in North Dakota to enjoin the Corps from lowering this reservoir. The District Court entered a temporary restraining order on Sunday, May 12, [2002] which required the Corps to maintain [Lake Sakakawea's] water level." 330 F.3d at 1021-22. The Corps then attempted to lower Fort Peck Reservoir in Montana, but the State of Montana followed suit and, on May 13, 2002, obtained yet another injunction barring releases from Fort Peck Reservoir.

Left with no alternative, Nebraska filed suit in the Nebraska District Court on May 13, 2002 and obtained an injunction requiring the Corps to operate the main stem dams and reservoirs in strict accordance with the FCA, the Master Manual and the operative AOP. The Nebraska Court explained it was "reluctant to interfere with the discretion of the Corps, but must recognize that the court orders in other jurisdictions designed to safeguard interests of upstream uses are quickly stripping the Corps of

Engineers of its ability to function as an objective steward of the water flows of the Missouri River Basin." 330 F.3d at 1022.

The Corps immediately appealed to the Eighth Circuit Court of Appeals the judgment of each District Court. Nebraska and the other proposed intervenors appealed the orders denying intervention.

While the cases were pending before the Eighth Circuit Court of Appeals, Nebraska filed a motion before the Judicial Panel on Multidistrict Litigation seeking to transfer the underlying actions, along with four other actions arising out of the Corps' Missouri River operations, to a single district court for consolidated proceedings. Within hours of oral argument on Nebraska's motion, and over the objections of the Dakotas and the State of Missouri, the Panel granted the motion and ordered the cases transferred to Judge Paul A. Magnuson in the District Court for the District of Minnesota. The consolidated cases are now proceeding before that court as *In re Operation of the Missouri River System Litigation*, 03-MD-1555. Motions for summary judgment have been filed and are awaiting decision on various issues arising under the FCA, the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*

III. THE ISSUES PRESENTED TO AND DECIDED BY THE EIGHTH CIRCUIT COURT OF APPEALS.

The issue before the Eighth Circuit Court of Appeals was the validity of the various District Court injunctions discussed above, as well as the South Dakota District Court's denial of intervention. After holding that the South

Dakota District Court had improperly denied intervention to the State of Nebraska, 330 F.3d at 1026, the Eighth Circuit Court of Appeals proceeded to address the merits of the injunctions.

Each case was a challenge to the Corps' actions. The Court of Appeals' review was guided by the Administrative Procedure Act ("APA"). 330 F.3d at 1027. Before assessing the propriety of the Corps' actions under 5 U.S.C. § 706(2)(A), however, the Court of Appeals first disposed of the Corps' argument that its operations were unreviewable. *Id.* The Eighth Circuit concluded otherwise, holding:

> Because the language and context of the Master Manual and the Corps's treatment of the manual indicate that it binds the Corps, we conclude that it is binding. The Corps is not free to ignore the Master Manual (though it may elaborate upon details of operation in its annual operating plans), and courts can review the Corps's actions to ensure conformity. In the end, then, there is sufficient law to apply in these cases. In each case, courts can assess whether the Corps's actions run afoul of either the Flood Control Act or the Master Manual.

Id. at 1029-30.

Having determined that the Corps' actions were reviewable under the APA, the Court of Appeals proceeded to systematically evaluate the propriety of each District Court injunction. Specifically, the Court of Appeals addressed the parties' likelihood of success on their claims that the Corps' actions were unlawful under the APA's "arbitrary and capricious" review standard in light of the Master Manual's requirements. 5 U.S.C. § 706(2)(A). The

Court first addressed the injunction issued by the South Dakota District Court.

South Dakota claimed entitlement to relief on three grounds:

> First, it alleged that the Flood Control Act requires the Corps to act so as to maximize all interests on the River, including recreation. Second, the State argues that it is entitled to relief because the Corps is judicially estopped to favor navigation over recreation. Finally, South Dakota maintains that the Corps acted arbitrarily and capriciously in favoring navigation over recreation.

Id. 330 F.3d at 1030. The Court held "none of these arguments is likely to succeed on the merits."

With regard to South Dakota's first argument, the Court of Appeals explained "South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency action." 330 F.3d at 1030. Citing a basic canon of administrative law, the Court explained "[a]s a general rule, courts defer to agency policy decisions because it is not a court's 'function to substitute [its] judgment for that of the agency.'" *Id.* (citation omitted). The Court "[did] not believe that the portions of the Flood Control Act's legislative history to which South Dakota directs this Court are sufficient to achieve such a radical shift from the normal standard of review." *Id.* On this point, the Court concluded: "Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests." *Id.* at 1031. The Court also rejected South Dakota's judicial estoppel theory

finding the Corps had given "equal consideration" to recreation interests, if not equal results. *Id.* at 1031. The Court reviewed the Corps' determination that recreation would not be harmed by unbalanced reservoir regulation and the necessary releases from Lake Oahe, concluded that the Corps had properly considered the impacts of its action, and determined that the Corps' action was reasonable. *Id.*

Ultimately, the Court of Appeals held under 5 U.S.C. § 706(2)(A): "The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. . . . This plan was eminently rational." 330 F.3d at 1032.

The Court of Appeals then analyzed North Dakota's claims. Characterizing them as "quite similar to those made by South Dakota," the Court did not again address the State's claims of judicial estoppel or that the Corps' actions were arbitrary and capricious. 330 F.3d at 1032. The Court independently addressed only North Dakota's claim that the "Flood Control Act itself precludes the Corps from favoring navigation over recreation." *Id.* The Court of Appeals held: "This argument is simply incorrect; the Flood Control Act does not require the Corps to give equal treatment to recreation." *Id.* Citing this Court's decision in *ETSI Pipeline*, the Court of Appeals explained that the Corps' prioritization of navigation over recreation was "not impermissible." *Id.*

With regard to the Nebraska District Court's injunction, the Court of Appeals held:

> The preliminary injunction entered in the Nebraska District Court was wholly different from

> those entered in North Dakota and South Dakota. The Nebraska District Court ordered the Corps to abide by the Master Manual because it concluded that the Manual binds the Corps. We can find no error with this conclusion. The Master Manual does bind the Corps, and under 5 U.S.C. § 706, Nebraska was entitled to an order that the Corps abide by its own formally adopted policies.

330 F.3d at 1033.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The Rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* The Dakotas' Petition has none of these characteristics.

As explained below, the Question Presented, as articulated by the Dakotas, was not passed upon below. The Eighth Circuit Court of Appeals correctly decided the discrete issues before it. The decision below was consistent with this Court's prior decisions and created no conflict between the circuits. The Dakotas improperly seek to expand this Court's review beyond the issues decided below and, ultimately, request review of Congressional choices reflected in the FCA. A petition for certiorari is not the appropriate vehicle for the Dakotas' cause.

I. THE QUESTION PRESENTED WAS NOT PASSED UPON BELOW.

The "traditional rule" of this Court precludes a grant of certiorari when the question presented "was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738 (1992). The Question Presented seeks review of the following issue:

> Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

Petition at (i). The Dakotas improperly aggrandize the issue decided by the Court of Appeals. That Court simply did not decide the Question Presented.

The Court of Appeals held that the Master Manual is binding on the Corps and that, as a result, there was "law to apply" for purposes of judicial review of the Corps' Missouri River operations. 330 F.3d at 1029. Thus, the Dakotas' characterization of the impetus for this action as a "decision" by the Corps to "sacrifice upstream fisheries by destroying the smelt to satisfy the demands of the dwindling navigation industry" is inaccurate. Petition at 9. The Corps' "decision" was pre-determined by law. The Corps was bound, under the pre-existing terms of the Master Manual and its unbalanced reservoir regulation regime to release water from Lake Oahe as scheduled to meet all of the authorized uses downstream, including water supply and power generation. The Corps simply lacked discretion to retain water upstream at the expense of downstream uses.

Evaluating, under the APA's arbitrary and capricious standard, the Corps' 2002 operations against the FCA and Master Manual's requirements, the Court of Appeals concluded that the Corps did not act improperly. *E.g.*, 330 F.3d at 1032. Further, the Court rejected South Dakota's contention that the Corps must "balance the interests each year so as to maximize each category of benefits" and that the Corps' balancing was reviewable to ensure maximization. 330 F.3d at 1030-31. The Court also held that "the Flood Control Act does not require the Corps to give equal treatment to recreation," and that the Corps' decision to elevate flood control and navigation was consistent with this Court's decision in *ETSI Pipeline*. 330 F.3d at 1032.

The decision below represented a straightforward application of 5 U.S.C. § 706(2)(A). There is nothing unique about the Court of Appeals' review of agency action under the APA. Contrary to the Dakotas' characterization, the Eighth Circuit simply did not rule that the FCA "requires that the Corps must generally favor stagnant downstream navigation over thriving upstream recreation." Petition at (i). Nor did the Court of Appeals hold that the FCA allows the Corps to "consistently allocate" Missouri River water from the upper to lower basin at the expense of upstream interests. The Court of Appeals simply held that the Corps' 2002 operations were reasonable considering the Corps' mandates under the FCA and the Master Manual. The Appellate Court's rejection of the Dakotas' proffered standard against which to measure the Corps' performance (which would erroneously require the Corps to maximize recreation uses) does not equate to a holding that the Corps can "sacrifice upstream fisheries" to serve "the dwindling navigation industry." Petition at 9.

The Question Presented was not decided by the Eighth Circuit Court of Appeals. The Dakotas' Petition should, therefore, be denied.

II. THE ISSUE ACTUALLY PRESENTED BELOW WAS CORRECTLY DECIDED.

The Eighth Circuit Court of Appeals correctly rejected the Dakotas' basic premise, that the FCA requires the Corps to "equitably balance the uses to which the river is put." Petition at (i). This Court previously explained that the "dominant function" to which the Corps-operated facilities are to be devoted under the FCA is flood control and navigation. *ETSI Pipeline*, 484 U.S. at 512, 108 S.Ct. at 815. While Congress permitted secondary uses, including recreation, to be served, such uses were to be at all times subservient to flood control and navigation.

The Dakotas' argument that Congress, in the FCA, did not prioritize the uses to which the waters of the Missouri River are to be placed is simply incorrect. *See* Petition at 4. Section 4 of the FCA states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . ***when such use is determined by the Secretary of War not to be contrary to the public interest.***"[4] *Id.* (Emphasis supplied.) There is no such "public interest" limitation on any other authorized use. The Corps implements this significant limitation by

[4] The Dakotas ignore this important modifier in Section 4 when they discuss the FCA's provision for conditional recreation uses. Petition at 17.

requiring the operation of the main stem dams to provide for recreation "insofar, as possible without serious interference" with the other project purposes. Master Manual, § IX, ¶ 9-3. Congress intended this public interest limitation to subjugate recreational sport fishing to other project purposes. Recreation is not entitled to "parity" with flood control and navigation. Petition at 16.

Similar prioritization appears throughout the FCA. For example, Section 6 of the FCA states in part:

> That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That ***no contracts for such water shall adversely affect then existing lawful uses of such water***. . . .

(Last emphasis supplied). Section 8 (in its amended form, now 43 U.S.C.A. § 390)[6] reads:

> Dams and reservoirs operated under the direction of the Secretary of the Army may be utilized after December 22, 1944, for irrigation purposes only in conformity with the provisions of this section, but ***the foregoing requirement shall not***

[6] Section 8 in its original form declared in part: "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, ***but the foregoing requirement shall not prejudice lawful uses now existing***. . . ." (Emphasis supplied).

> ***prejudice lawful uses now existing***. . . . In the case of any reservoir project constructed and operated by the Corps of Engineers, the Secretary of the Army is authorized to allocate water which was allocated in the project purpose for municipal and industrial water supply and which is not under contract for delivery, for such periods as he may deem reasonable, for the interim use for irrigation purposes of such storage until such storage is required for municipal and industrial water supply. ***No contracts for the interim use of such storage shall be entered into which would significantly affect then-existing uses of such storage.***

(Emphasis supplied).

Likewise, the Dakotas' summary of the Pick and Sloan plans and the joint committee report reconciling the two is incomplete and misleading. Nebraska does not dispute that these documents reflect an understanding that recreation and wildlife interests would benefit from the construction and operation of the overall project which, as envisioned, included hundreds of Bureau of Reclamation facilities off of the main stem Missouri River. However, when read in context, it is clear that Congress understood these benefits would accrue not by design, but by incident. More importantly, when speaking directly to use of the main stem reservoirs at issue here, their intended purpose is clear.

The committee report states:

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of

> irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

S. DOC. NO. 247 at 3-4. The Sloan Plan similarly states, with regard to the reservoirs at issue:

> This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow. Such reservoirs will contribute to flood control not only on the lower river but at all points from the mouth of the river to the reservoir sites; they will aid navigation on the lower river by reducing flood damages to navigation works and by increasing the dry-season flow; they will enlarge the supply of water available for irrigation; and they will make practicable the generation of electrical energy at many places.

S. DOC. NO. 191, 78th Cong., 2nd Sess. (May 5, 1944) at 17-18. The Sloan Plan states that the water stored in Oahe Reservoir "will be available for navigation purposes on the lower river" and that ample storage capacity will be provided to reduce downstream flood flows from Sioux City to Kansas City. *Id.* at 116. It further states, "[a]s the flow of the river at Oahe is to be regulated to permit downstream navigation, large outflows will be required during the navigation season, from March 15 to November 15 of each year." *Id.* Interpreting Pick, the Sloan Plan notes that on the main stem of the Missouri River, the Corps intends to create storage "at the Garrison, Oak Creek, Oahe, Fort Randall, and Gavins Point sites for flood control, navigation, power production, and irrigation purposes." *Id.* at 121.

Both the Pick and Sloan Plans generally refer to benefits accruing to recreation and wildlife. When discussing the fundamental need for the project, however, the Pick Plan clearly explains:

> Flood control and the conservation of water resources are urgently needed in the Missouri River basin. The water that now produces floods should be stored and put to beneficial use in the interest of navigation, power development, irrigation, and other useful purposes.

H. DOC. NO. 475, 78th Cong., 2nd Sess. (March 2, 1944) at 17. The Sloan Plan provides:

> The boundaries of this subdivision [Fort Peck to Sioux City] of the Missouri River basin have been drawn to include all areas in which water from the main stream below Fort Peck can be utilized for irrigation, flood control, power generation, municipal water supply, or other miscellaneous purposes. Until 1940, practically none of its waters were being so used. As an economic or social resource, the Missouri has been a menace rather than a valuable asset.

S. DOC. NO. 191 at 96. Neither the authors of these respective plans, nor Congress upon their approval, could have intended that "other miscellaneous" and "other useful" purposes would be given co-equal status with the enumerated purposes of flood control, navigation, power generation and water supply.

In sum, the Pick and Sloan Plans recognized that construction and operation of main stem dams and reservoirs would incidentally create recreation and wildlife opportunities. But, the Plans do not contemplate operation of reservoirs or other facilities for the express purpose of

promoting such interests to the exclusion of flood control, navigation, power generation or water supply. At base, the Pick-Sloan architects recognized "[a]ll these reservoirs will serve one fundamental purpose, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow." S. DOC. NO. 191 at 21. The notion that any of the main stem reservoirs should be operated to retain water upstream in satisfaction of incidental recreational interests to the exclusion of enumerated downstream uses is simply inconsistent with the plan approved by Congress in 1944.

Within the context of the foregoing, Congress instructed the Secretary of War to prepare regulations to implement the Flood Control Act. Section 7 of the Act directed in part:

> Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations. . . .

In contrast to Section 4, which authorized recreational use of the reservoirs "under such rules and regulations as the Secretary of War may deem necessary," Section 7 required the Secretary of War to prescribe regulations for the use of storage allocated for the dominant project functions of flood control and navigation, and mandated that the projects be operated in compliance with those regulations. The Corps, in promulgating and administering the Master Manual and Annual Operating Plans, has given effect to the will of Congress. The Master Manual

conforms to the objectives and specific provisions of authorizing legislation, as required by 33 C.F.R. § 222.5(f)(1).

Consistent with the FCA, the Master Manual recognizes that fishery and recreation uses are subordinate to other purposes. For example, Section IX, ¶ 9-3 states that "insofar as possible without serious interference with the foregoing functions [flood control, irrigation, municipal and industrial and water quality, navigation and power], the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." Section IX, ¶ 9-35 states that "[w]hile manipulation of the levels of larger reservoirs (Fort Peck, Garrison, and Oahe) to enhance this function [outdoor recreational pursuits] is not practical, recreation will be recognized during periods of system storage drawdown by maintenance of balanced storage within these two [sic] projects to the extent practical."

That the upper basin reservoirs must fluctuate to meet authorized downstream uses is a truism applicable to all reservoirs and of which the Dakotas have been aware for decades. The Master Manual specifically explains the fact that it is not possible to operate each reservoir each year for optimum fish management. Section IX, ¶ 9-38 of the Master Manual states that "it must be recognized that some fluctuation in the reservoir levels is unavoidable if the reservoirs are to perform functions for which designed. A continuing objective in regulation of the system is to minimize departures in pool elevation from normal full multi-purpose levels to the maximum practical extent consistent with other project functions." Section IX, ¶ 9-31 states:

> The Federal and state fish and wildlife agencies recognize that it is not possible to operate each

> reservoir each year for optimum fish management and have indicated that a good spawn of a fish species 1 year out of 4 or 5 is adequate to maintain the fishery resource in a specific reservoir. Therefore, one or more reservoirs may be selected each year for emphasis in the enhancement of fish management and, to the extent that inflows and regulation requirements for other purposes permit, the selected projects are regulated to improve the fishery resource.

The Dakotas contend "[t]he critical conclusion of the court below was that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation." Petition at 25. However, as discussed above, the Eighth Circuit actually held that the Master Manual was binding on the Corps, a holding with regard to which the Dakotas allege no error. Once the Court determined that the Master Manual was binding, it evaluated the Corps' decision to release water from the upstream reservoirs to meet authorized project purposes downstream in light of the Corps' authorities under the FCA and the Master Manual. Accordingly, the Eighth Circuit concluded that the Corps' releases were not arbitrary and capricious under 5 U.S.C. § 706(2)(A).

In light of Congressional intent apparent from the language of the FCA, and as Congress' directives have been implemented by the Corps in its Master Manual for over 40 years, the Eighth Circuit correctly concluded that the Corps' actions were reasonable. To the extent the Dakotas seek to force revision of the Corps' operations under the Master Manual, such action amounts to an untimely challenge to the Manual itself and a collateral attack on this Court's decision in *ETSI Pipeline*.

III. THE DAKOTAS ASK THE COURT TO REVIEW AND JUDGE THE WISDOM OF CONGRESS' CHOICES UNDER THE FCA.

By this action, the Dakotas seek judicial review of the wisdom of Congressional choice reflected in the FCA and implemented through the Master Manual. The Dakotas begin their Statement of this case by explaining:

> This case is about the fair division of Missouri River waters among the seven states through which it flows. It is about whether those states – Montana, North Dakota, and South Dakota – that sacrificed the most to protect the entire basin from floods are to be allowed an appropriate measure of benefit from federal dams and reservoirs. . . .

Petition at 2. This, of course, reveals the true nature of what the Dakotas seek here – equitable relief designed to effectively allocate the waters of the Missouri River.

The Dakotas ask this Court to rewrite the historical development of the Upper Basin. They ask the Court make up for lost opportunities and benefits once foreseen but never derived. They argue certiorari should be granted in light of the Federal government's role in developing the Missouri River Basin, and because the "magnitude of the federal impact alone merits this Court's attention." Petition at 15. They further question the ability of Corps to execute Congressional mandates impacting civilian interests. *Id.* None of these arguments, individually or collectively, is sufficient to support the grant of certiorari.

According to the Dakotas, they "were promised, in return for the presence of huge reservoirs within their borders, large irrigation projects. These promises remain

unfulfilled." Petition at 2. The Dakotas lament "their sacrifices," Petition at 7, and decry the Upper Basin has been "short-changed." *Id.* at 8. The litigants, of course, may debate the Dakotas' account of the Basin's development. This is especially true in light of the fact that the very industries the Dakotas seek to enhance in this case were created in the first instance by construction of the main stem reservoirs and operations under the Master Manual. As even the Dakotas recognize, "[t]he economic value provided by Missouri River recreation is exceptional . . . . " *Id.* Nevertheless, in the Dakotas' view, that value "has not attained its full potential."

Thus, the Petition is about maximizing the Dakotas' interests at the expense of established downstream uses authorized by Congress and reliant on the Corps' existing operations. It is about making up for opportunities lost. To the extent the Dakotas believe their interests are not adequately represented, the Dakotas may seek relief from Congress or attempt to invoke the original jurisdiction of this Court. A petition for certiorari is an improper means to achieve what the Dakotas seek. Their Petition is misplaced and should be denied.

CONCLUSION

The Petition asks this Court to review the wisdom of Congressional choices made decades ago. Properly cast, it is little more than an appeal from a relatively straightforward application of the APA to the Corps' reservoir management under the Master Manual. The Master Manual properly implements the will of Congress as reflected in the FCA. The Corps is bound by the Master Manual, and

reservoir operations conducted pursuant to its express terms are neither arbitrary nor capricious. The Question Presented, designed to reassess Congressional choices reflected in the FCA, was neither pressed nor passed upon in the court below. Certiorari should not be granted.

Respectfully submitted,

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